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IN THE
Supreme Court of the United States

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

CHRISTOPHER SIMMONS,
Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF FOR THE HUMAN RIGHTS COMMITTEE OF THE BAR OF ENGLAND AND WALES, HUMAN RIGHTS ADVOCATES, HUMAN RIGHTS WATCH, AND THE WORLD ORGANIZATION FOR HUMAN RIGHTS USA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

CONSTANCE DE LA VEGA*
UNIVERSITY OF SAN FRANCISCO
SCHOOL OF LAW
2130 Fulton Street
San Francisco, CA 94117
(415) 422-6752

* Counsel of Record — *Counsel for Amici Curiae*

(Additional counsel listed on the inside cover.)

MICHAEL BOCHENEK
HUMAN RIGHTS WATCH
350 Fifth Avenue, 34th Floor
New York, New York 10118-3299

AUDREY J. ANDERSON
WILLIAM H. JOHNSON
HOGAN & HARTSON L.L.P.
555 Thirteenth St., N.W.
Washington, D.C. 20004

THOMAS H. SPEEDY RICE
UNIVERSITY OF CENTRAL ENGLAND
SCHOOL OF LAW, PERRY BAR
Birmingham, B42 2SU
Great Britain

PHILIP SAPSFORD, Queen's Counsel
GOLDSMITH CHAMBERS
Temple, London EC4
Great Britain

HUGH SOUTHEY
14 Tooks Court
Cursitor Street
London EC4A 1LB
Great Britain

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STATEMENT OF INTEREST

Human Rights Committee of the Bar of England and Wales, Human Rights Advocates, Human Rights Watch, and the World Organization for Human Rights USA hereby request that this Court consider the present brief pursuant to Sup. Ct. Rule 37.2(a) in support of Respondent.[1] The interests of *amici* are described in detail in the Appendix.

[1] Letters from both counsel consenting to the filing of this brief are being sent with this brief to the Clerk of the Court. Counsel for

Amici urge the Court to consider international law and opinion when applying the Eighth Amendment's clause prohibiting cruel and unusual punishment. The importance of recognizing international law and treaty standards as they relate to the execution of persons who were under 18 at the time the committed their crime ("the juvenile death penalty") is imperative to the future of domestic compliance with international norms, and those international laws and norms are an important indicator of how community standards regarding the juvenile death penalty have evolved. Failure to comply with those norms is isolating the United States as the lone violator in the world. Incorporation into the Eighth Amendment of the almost universal prohibition against the juvenile death penalty would bring the United States into compliance with one of the most widely accepted human rights norms.

SUMMARY OF ARGUMENT

International law and opinion have informed the law of the United States from the Declaration of Independence forward. The Founders were greatly influenced by international legal and social thought; and throughout the history of this country, courts have referred to international standards in considering the permissibility of practices under the Constitution. This is particularly true with respect to the Eighth Amendment's cruel and unusual punishment clause. Of particular relevance have been the law and opinions of the United Kingdom.

Thus, *amici* consider the history of treatment of juveniles in the United Kingdom, as well as the status of the international law and practice with respect to the juvenile death

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a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

penalty, to be of particular interest to this Court. With respect to the former, very few juveniles were ever executed in the United Kingdom. In 1933, the execution of those aged 18 at time of sentence was forbidden, and in 1948 the death penalty was prohibited for those who were under 18 at the time of the offense. These developments took place at a time when the death penalty for adults was still allowed.

Similarly, virtually every other country in the world has rejected the practice of executing juvenile offenders. The prohibition against the execution of persons who were under 18 years of age at the commission of the crime is now not only customary international law, it has attained the status of *jus cogens*, a peremptory norm of international law. No other nation has executed juvenile offenders at the rate practiced in the United States. And, while a handful of other nations have executed juvenile offenders in the past 15 years, those countries have either changed their laws raising the age to 18 or have in other ways accepted the norm.

Amici urge this Court to consider the history and laws of the United Kingdom, international law generally, and the *jus cogens* norm in particular in determining that under the Eighth Amendment's clause prohibiting cruel and unusual punishment, standards have now evolved to prohibit the juvenile death penalty.

ARGUMENT

I. INTERNATIONAL LAW AND OPINION FORM A BASIS OF LAW AND GOVERNMENT IN THE UNITED STATES

From the beginning, the laws of the United States have been informed and shaped by laws and opinions of other members of the international community. Indeed, the Declaration of Independence itself speaks to the significance of other nations: "When in the course of human events, it becomes necessary for one people to dissolve the political

bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, *a decent respect to the opinions of mankind* requires that they should declare the causes which impel them to the separation." The Declaration of Independence para. 1 (U.S. 1776) (emphasis added).

In urging courts to afford the intended "decent respect to the opinions of mankind," Justice Blackmun has explained that:

> [T]he early architects of our Nation understood that the customs of nations—the global opinions of mankind—would be binding upon the newly forged union. John Jay, the first Chief Justice of the United States, observed . . . that the United States "had, by taking a place among the nations of the earth, become amenable to the laws of nations."

Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39 (1994) (citation and footnotes omitted).

In fact, the very constitutional provision at issue in this case—the Eighth Amendment's prohibition on "cruel and usual punishment inflicted"—traces its origin directly to the laws of another nation. The foundation for the phrase "cruel and unusual" stemmed from the "Anglo-American tradition of criminal justice." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). The phrase was taken directly from the English Declaration of Rights of 1688, and the principle itself came from the Magna Carta. *Id.* For this reason, the Amendment's meaning must be drawn from the "evolving standards of decency that mark the progress of a maturing society." *Id.* at 101.

Thomas Jefferson, the drafter of the Declaration of Independence, had a keen appreciation for international opinion and law. Accordingly, the Declaration of Independence reflects a broad understanding of eighteenth century political

thought, and was greatly influenced by French, English, and Scottish Enlightenment philosophers and their understanding of ancient Greek democracy and the Roman Republic. Jefferson's belief in the social contract came from British political philosopher John Locke and Christian Wolff of Germany.

Likewise, other Founders used their knowledge of international and social thought and enlightenment as they sought to create a more perfect Union. For example, Benjamin Franklin—the only person to sign all three founding documents, the Declaration of Independence, the Constitution and the Treaty of Paris—was versed in the writing of Aristotle, Plato, Cicero, Virgil, and St. Thomas Aquinas and was greatly influenced by the Assize of Clarendon, which in the year 1166 defined the rights and duties of courts and people in criminal cases. Revealing his humility, however, Franklin's speech on the last day of the constitutional convention recognized the role of the evolution of thought in connection with our laws and institutions:

> I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve of them. For having lived long, I have experienced many instances of being obliged by better information, or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise.

Benjamin Franklin, The Debates on the Federalist Convention of 1787, Reported by James Madison (Sept. 17, 1787), *available at* http://www.usconstitution.net/franklin.html.

Similarly, John Adams was sensitive to, and familiar with, international opinion as it related to the Nation's laws and institutions. During his time as Minister to Great Britain, Adams wrote a multi-volume defense of the new Constitution and its form of government answering many critics of the new republic. In it he demonstrates his deep knowledge

of various forms of governments and the necessity of selecting the best the world has to offer to create a better government.

> If Cicero and Tacitus could revisit the earth, and learn that the English nation had reduced the great idea to practice, and brought it nearly to perfection, by giving each division a power to defend itself by a negative; had found it the most solid and durable government, as well as the most free; had obtained, by means of it, a prosperity among civilized nations, in an enlightened age, like that of the Romans among barbarians: and that the Americans, after having enjoyed the benefits of such a constitution a century and a half, were advised by some of the greatest philosophers and politicians of the age to renounce it, and set up the governments of ancient Goths and modern Indians—what would they say? That the Americans would be more reprehensible than the Cappadocians, if they should listen to such advice.

John Adams, *A Defence of the Constitutions of Government of the United States of America*, Preface, Grosvenor Square (January 1, 1797), *available at* http://www.constitution.org/jadams/ja1_00.htm.

Consistent with the approach of the Founders, on a number of occasions and with increasing frequency, this Court has recognized the relevance of international norms when considering the permissibility of practices in this country. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 2483 (2003) (noting that "the right [of adults to engage in intimate, consensual conduct] has been accepted as an integral part of human freedom in many other countries"); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J. concurring) (noting support for affirmative action policies in international law); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (considering international opinion in connection with felony murder). In particular, the Court has looked to the standards of the international community in determining

the contours of the Eighth Amendment's "cruel and unusual punishment" clause.[2] *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (considering international community's rejection of death penalty for persons with mental retardation); *Trop*, 356 U.S. at 102 (noting "virtual unanimity" within international community that denationalization constituted cruel and unusual punishment); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (Stevens, J., concurring) (noting opposition within international community to execution of people for crimes committed while they were 16 or younger); *Stanford v. Kentucky*, 492 U.S. 361, 370 n. 1 (1989) (Scalia, J.) (noting that "the practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so implicit in the concept of ordered liberty that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well"); *see also* Blackmun, *supra*, at 45-46. To view the evolving standard of decency in an isolated and insular domestic environment would be contrary to all that the drafters of the Constitution knew as essential to joining the ranks of nations. Applying the spirit of the Founders' to the issue of juvenile executions, it is apparent that the Founders would have soundly rejected this practice as contrary to enlightened political thought and the evolved standard of decency in international customary law. The Founders sought to elicit the very best from themselves, fellow citizens and universal mankind in creating the United States. They

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[2] "Refusing to consider international practice in construing the Eighth Amendment is convenient for a Court that wishes to avoid conflict between the death penalty and the Constitution. But it is not consistent with the Court's established construction of the Eighth Amendment. If the substance of the Eighth Amendment is to turn on the 'evolving standards of decency' of the civilized world, there can be no justification for limiting judicial inquiry to the opinions of the United States." Blackmun, *supra*, at 48.

were not concerned with the source of a just principle but rather with its value toward a just and honorable country. Similarly, this Court should consider domestic and international standards and recognize that the execution of juvenile offenders no longer has a place in an evolved society.

II. THE LAW AND OPINIONS OF THE UNITED KINGDOM ARE PARTICULARLY RELEVANT TO THIS COURT'S EIGHTH AMENDMENT ANALYSIS

Within the last year, a majority of this Court has noted that the United States shares values with "a wider civilization." *Lawrence*, 539 U.S. at ___, 123 S. Ct. at 2483. There can be little doubt that the United Kingdom, from whose laws the Eighth Amendment's prohibition on "cruel and unusual punishment" was borrowed, is an important part of that "wider civilization," and this Court should seek guidance from the United Kingdom's experience as it relates to the juvenile death penalty.

The close relationship between the United Kingdom and the United States has a long history and recent developments in world affairs have made that relationship even closer. The incumbent president has repeatedly commented on that close relationship and how it is based on shared values. *See* Statement by the Press Secretary to the President of the United States, September 25, 2003, *available at* http://www.usembassy.org.uk/bush283.html.

The United States not only shares fundamental values with the United Kingdom, but also a common law heritage. This has been recognized by this Court on numerous occasions. *See, e.g., Browning-Ferris Industries of Vermont, Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257, 273 (1989), and *Ferguson v. Georgia*, 365 U.S. 570, 582 (1961). In particular, this Court has recognized that American legal doctrines "derived from the laws and practices of our English ancestors." *United States* v. *Lee*, 106 U.S. 196, 205 (1882).

Consequently, the experience of England and Wales in determining the permissibility of the juvenile death penalty can provide guidance for this Court.

A. Historically, Juvenile Offenders Were Treated with More Leniency Than Adults in the United Kingdom in the Application of the Death Penalty

Historically, the common law allowed for the sentence of death for juveniles who knew what they were doing was wrong, although such sentences were rarely carried out. One researcher examined 136 judges' reports for mercy in the years 1787 and 1790 and concluded that "[s]ympathy for the young was mentioned in judges' positive recommendations more frequently than any other factor except good character." Peter King, *Decision-makers and Decision-making in the English Criminal Law, 1750-1800*, 27 Historical Journal, at 25, 45, Cambridge Univ. Press, (1984). King's study of death sentences from 1782 to 1787 also demonstrated a decided bias against passing death sentences on youths below 18 years of age, and that even fewer actual executions of persons below the age of 18 were ever carried out. *Id.* 35-42 (Figures 1-4).

In the eighteenth century the practice of not carrying out executions of young people developed so as to suggest that anyone less than 16 should not be executed. Radzinowicz and Hood point out in their examination of reprieves from 1861-1881 that "[t]he circumstances which weighed heavily with the Home Secretary were . . . youth of the offender, particularly up to the age of 17." Sir Leon Radzinowicz & Roger G. Hood, *The Emergence of Penal Policy*, in 5 A History of English Criminal Law and Its Administration from 1750, at 697, Stevens & Sons Publishers (1986). The last 17-year-old to be executed in the United Kingdom was Joseph Morley in 1887.

The United Kingdom's reluctance to execute young people eventually was codified to prohibit the execution of those

under 16. Children Act of 1908, 8 Edw. 7, c. 67 (Eng.). The penalty introduced in place of execution was detention at Her Majesty's Pleasure, which is a penalty that the courts have only ever been able to impose in cases involving young people or "lunatics" and remains the penalty imposed for those convicted of murder when aged under 18. Powers of Criminal Courts (Sentencing) Act 2000, § 90 (Eng.).

The choice of detention at Her Majesty's Pleasure was a significant development. Parliament could have provided that young people were detained for life; instead, it decided to provide for a "less severe form of sentence." R v Secretary of State for the Home Department Ex parte Venables, [1998] A.C. 407 HL at 521 (Per Lord Steyn) (hereinafter "Venables"). In particular, "[t]here is built into the sentence [of detention at Her Majesty's Pleasure] a measure of leniency in view of the age of the offender at the time of the offence." Venables, [1998] A.C. 407 HL at 532 (Per Lord Hope of Craighead). The Children Act of 1908 Act was "a notable piece of legislation, enshrining as it did in almost every section the principle that a young offender shall receive different treatment from an adult." Report of the Departmental Committee on the Treatment of Young Offenders, 1927 Cmd 2831.

In practice, following the enactment of the Children Act of 1908, the common law appears to have developed so that there were no executions of those under 18 at the time of sentence. In fact, only three executions of persons aged 18-21 were subsequently performed—in 1904, 1922 and 1925. Royal Commission on Capital Punishment 1949-1954 (1956), Appendix 2 (hereinafter "Gower Commission Report"). Then in 1930, the Select Committee on Capital Punishment recommended that the minimum age for execution be raised to 21. Report of the Select Committee on Capital Punishment (1930) at ¶ 189 (hereinafter "The Atkin Committee"). In reaching that conclusion, The Atkin Committee referred to the fact that:

> [T]he emotional balance of young people under the age of 21 is unstable, and this instability reduces their responsibility, and that the instability of adolescents, which in some cases may even amount to a form of mental disorder is very often a factor in the crime.

The Atkin Committee, at ¶ 193. Subsequently, the Children and Young Person's Act of 1933 (Eng.) prevented the execution of those aged 18 at the date of sentence. In 1948, the Criminal Justice Act prohibited the execution of people who were under 18 at the time of the offense.

Significantly, the statutory developments described above took place at a time when British law still accepted that adults could and should be executed. As a consequence they did not reflect any general concerns about the use of the death penalty. Instead the statutory developments formed part of an "elaborate legislative scheme which reflected a general policy of treating young offenders quite differently from older ones." A. W. B. Simpson, Report prepared for submission to the European Court of Human Rights in *Prem Singh v. United Kingdom*, unreported, (21 February 1996), cited with approval in Venables [1998] A.C. 407 HL at 481 (Per Lord Goff). In particular, the statutory developments were intended to impose an obligation upon the courts imposing a sentence "to have regard not only to retribution, deterrence and prevention of risk but also to the welfare of the child offender himself." Venables [1998] A.C. 407 HL at 498–99 (Per Lord Browne-Wilkinson).

In other words, for many years the legal system in England and Wales has recognized that young people who commit a murder should be treated with greater leniency. This Court should follow suit and recognize that the execution of juvenile offenders is inconsistent with evolving standards of decency.

III. INTERNATIONAL LAW AND OPINION ALSO CONDEMN THE EXECUTION OF JUVENILE OFFENDERS

Not only should this Court consider the laws of the United Kingdom, but general international law as well. The practice of executing persons who were under 18 at the time of their offense has been rejected by every nation in the world except the United States. In fact, the prohibition against the juvenile death penalty has reached the level of a *jus cogens* norm, which is binding on the United States. In determining whether the United States Constitution permits the execution of juvenile offenders, the Supremacy Clause mandates that binding international law, and in particular the non-derogable norm prohibiting the execution of juvenile offenders, be considered. In any event, even if this Court were not to recognize that the *jus cogens* norm against the juvenile death penalty prohibits the execution of juvenile offenders, the uniformity of international law and opinion against the practice should weigh heavily in this Court's determination that the juvenile death penalty is inconsistent with the Eighth Amendment's prohibition on cruel and unusual punishment.[3]

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[3] *Amici* do not here address the issue of whether there are binding treaty obligations under article 6(5) International Covenant on Civil and Political Rights applicable to this case since it was not raised by the parties. While the United States ratified that treaty with a reservation to that article, the validity of the reservation is questionable because it violates the object and purpose of the treaty and violates a *jus cogens* norm. *See Comments on United States of America*, Hum. Rts. Comm, 53rd Sess., U.N. Doc. CCPR/C/79/Add 50 at pp. 14 & 27 (1995); *General Comment - Human Rights Committee*, General Comment No. 24, U.N. Doc. CCPR/C/21/Rev.1/Add. 6 (1994); *see also* Connie de la Vega, *Amici Curiae Urge the U.S. Supreme Court to Consider International Human Rights Law in Juvenile Death Penalty Claim*, 42 Santa Clara L. Rev. 1041, 1050-1056 (2002).

A. The Prohibition Is Now a *Jus Cogens* Norm

Under article 53 of the Vienna Convention, a *jus cogens* norm is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 352 (hereinafter "Vienna Convention"). The Restatement (Third) of the Foreign Relations Law agrees with this standard and provides that a *jus cogens* norm is a "norm accepted and recognized by the international community of States as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character," and that the norm is established where there is acceptance and recognition by a "large majority" of states, even if over dissent by a very small number of states. Restatement (Third) of the Foreign Relations Law § 102 & rptr. n. 6 (1986) (citing *Report of the Proceedings of the Committee of the Whole*, at 471-72, U.N. Doc. A/Conf. 39/11 (1968)). Hence, a norm must meet four requirements in order to attain the status of a peremptory norm: 1) it is general international law; 2) it is accepted by a large majority of states; 3) it is immune from derogation; and 4) it has not been modified by a new norm of the same status. The prohibition against the execution of offenders who were under 18 at the time they committed their offense meets those requirements.

1. The Prohibition is General International Law

First, the prohibition against the execution of persons who were under 18 at the time they committed their crime is generally accepted in international law. Numerous treaties, declarations, and pronouncements by international bodies, as well as the laws of the vast majority of nations, are evidence of that law. Among the treaties are the International Cove-

nant on Civil and Political Rights, article 6(5) (International Covenant on Civil & Pol. Rights, Dec. 16, 1966, art. 6(5), 999 U.N.T.S. 171 (hereinafter "International Covenant")), the Convention on the Rights of the Child, article 37(a) (Convention on the Rights of the Child, Nov. 20, 1989, art. 37(a), 1577 U.N.T.S. 3), the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, article 68 (Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 75 U.N.T.S. 286 (hereinafter "Fourth Geneva Convention")), and the American Convention on Human Rights, Chapter 2, Article 4, Section 5 (American Convention on Human Rights, Nov. 22, 1969, art. 4, 1144 U.N.T.S. 123).

Similarly, a resolution by the United Nations Economic and Social Council opposed the imposition of the death penalty for juvenile offenders. *See Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, E.S.C. Res. 1984/50, annex, 1984 U.N. ESCOR Supp. No. 1, at 33, U.N. Doc. E/1984/84 (1984). And in 1985, the United Nations General Assembly adopted by consensus the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), which also oppose capital punishment for juveniles. G.A. Res. 40/33, annex, 40 U.N. GAOR Supp. No. 53, at 207, U.N. Doc. A/40/53 (1985).

The United Nations Commission on Human Rights since 1997 has passed annual resolutions calling on states "not to impose [the death penalty] for crimes committed by persons below 18 years of age." *See The Question of the Death Penalty,* Comm. on Hum. Rts., 60th Sess., Resolution 2004/67, adopted April 22, 2004, U.N. Doc. E/CN.4/RES/2004/67 (2004); *The Question of the Death Penalty*, Comm. on Hum. Rts., 59th Sess., Resolution 2003/67, adopted April 24, 2003, U.N. Doc. E/CN.4/RES/2003/67 (2003); *The Question of the Death Penalty*, Comm. On Hum. Rts., 58th Sess. Resolution

2002/77, adopted April 25, 2002, U.N. Doc. E/CN.4/RES/2002/77 (2002); *The Question of the Death Penalty*, Comm. on Hum. Rts., 57th Sess. Resolution 2001/68, adopted April 25, 2001, U.N. Doc. E/CN.4/RES/2001/68 (2001); *The Question of the Death Penalty*, Comm. on Hum. Rts., 56th Sess. Resolution 2000/65, adopted April 27, 2000, U.N. Doc. E/CN.4/RES/2000/65 (2000); *The Question of the Death Penalty*, Comm. on Hum. Rts., 55th Sess. Resolution 1999/61, adopted April 28, 1999, U.N. Doc. E/CN.4/RES/1999/61 (1999); *The Question of the Death Penalty*, Comm. on Hum. Rts., 54th Sess. Resolution 1998/8, adopted April 3, 1998, U.N. Doc. E/CN.4/RES/1998/8 (1998); *The Question of the Death Penalty*, Comm. on Hum. Rts., 53rd Sess. Resolution 1997/12, adopted April 3, 1997, U.N. Doc. E/CN.4/RES/1997/12 (1997).

Those Commission resolutions passed with a number of dissenting votes, reflecting the fact that they also called for a moratorium on the death penalty generally. Since a number of countries still have the death penalty—which is not prohibited by the International Covenant and the prohibition of which is not as widely accepted as the prohibition on the juvenile death penalty is—many countries opposed the broader moratorium. Other Commission resolutions that mention only the prohibition against the juvenile death penalty, however, passed by consensus. *See Rights of the Child,* Comm. on Hum. Rts., 59th Sess. Resolution 2003/86, adopted April 25, 2003, U.N. Doc. E/CN.4/RES/2003/86 ¶ 35 (2003),[4] *Rights of the Child*, Comm. on Hum. Rts., 58th Sess. Resolution 2002/92, adopted April 26, 2002, U.N. Doc. E/CN.4/RES/2002/92 ¶ 31(a) (2002); *Human Rights in the*

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[4] An effort by the United States to delete that paragraph lost by a vote of 51-1, See United Nations Press Release, *Commission on Human Rights Adopts Resolution on Situation in Iraq; Concludes Substantive Work*, April 25, 2003, Afternoon at 9-10.

Administration of Justice, in Particular Juvenile Justice, Comm. on Hum. Rts., 58th Sess. Resolution 2002/47, adopted April 23, 2002, U.N. Doc. E/CN.4/RES/2002/47 ¶ 19 (2002); *Rights of the Child*, Comm. on Hum. Rts., 57th Sess., Resolution 2001/75, adopted April 25, 2001, U.N. Doc. E/CN.4/RES/2001/75 ¶ 28(a) (2001). While the United States opposed the resolution in 2004, the resolution passed by a vote of 52-1. *See Rights of the Child*, Comm. on Hum. Rts. 60th Sess. Resolution 2004/48, adopted April 14, 2004, U.N. Doc. E/CN.4/RES/2004/48 (2004). Each of those resolutions requests governments to end the practice of executing juvenile offenders.

The United Nations Sub-Commission on the Promotion and Protection of Human Rights has passed similar resolutions condemning the juvenile death penalty. In 1999, the Sub-Commission specifically noted that the United States is one of only six countries that had executed juvenile offenders since 1990 and that it accounted for 10 of the 19 executions during that time period. *The Death Penalty, Particularly in Relation to Juvenile Offenders*, U.N. Sub-Comm'n on the Promotion and Protection of Human Rights, 52nd Sess., Resolution 1999/4, adopted August 24, 1999, U.N. Doc. E/CN.4/Sub.2/RES/1999/4 (1999). One year later, the Sub-Commission affirmed "that the imposition of the death penalty on those aged under 18 at the time of the commission of the offence is contrary to customary international law." *The Death Penalty in Relation to Juvenile Offenders*, U. N. Sub-Comm'n on the Promotion and Protection of Human Rights, 53rd Sess., Resolution 2000/17, adopted August 17, 2000, U.N. Doc. E/CN.4/Sub.2/RES/ 2000/17 (2000). Again, the latter resolution was adopted without a vote.

Other international bodies have reached the same conclusion. The Inter-American Commission on Human Rights—the body responsible for the protection of fundamental freedoms in the Organization of American States (OAS), an organization which includes the United States—found that a

jus cogens norm proscribes the execution of persons who were under 18 at the time of the commission of their crime. *Michael Domingues v. United States*, Inter-Am. C.H.R., 62/02, Merits Case 12.285 (2002) (http://wwwcidh.org/annualrep/2003eng/USA.12285.htm). The Inter-American Commission has since reaffirmed its ruling in *Domingues* several times. *See, e.g., Napoleon Beazley v. United States,* Inter-Am. C.H.R., 101/03, Merits Case 12.412, (2003); (http://www.cidh.org.org/annualrep/2003eng/usa.11412.htm) *Gary Graham v. United States*, Inter-Am, C.H.R., 97/03, Merits Case No. 11.193, (2003) (http://www.cidh.org/annualrep/2003eng/usa.11193.htm); *Douglas Christopher Thomas v. United States*, Inter-Am. C.H.R., 100/03, Merits Case No. 12.240, (2003) (http://www.cidh.org/annualrep/2003/eng/usa.122240.htm).

These treaties, declarations, resolutions, and pronouncements by international bodies demonstrate that the prohibition of the juvenile death penalty is now part of general international law.

2. The Prohibition Is Accepted by Every Other Country in the World

The second requirement for a *jus cogens* norm is satisfied in that the norm is accepted "by 'a very large majority of' States, even if over dissent by 'a very small number' of states." Restatement (Third) of Foreign Relations Law, § 102, rptr. n. 6 (interpreting the Vienna Convention and citing to *Report of the Proceedings of the Committee of the Whole*, *supra* at 471-72). The United States is the only country in the world that has not accepted the international norm against the execution of juvenile offenders. The only other countries known to have executed juvenile offenders in the last 10 years have since abolished the practice, acknowledged that such executions were contrary to their laws, or denied that they took place.

The United States' isolated stance on the issue of the juvenile death penalty is evidenced by the status of the Convention on the Rights of the Child. Almost every nation in the world has ratified that Convention. *See Rights of the Child: Status of the Convention on the Rights of the Child*, Report of the Secretary General, U.N. ESCOR, Hum. Rts. Comm., 54th Sess., Agenda Item 20, 2, U.N. Doc. E/CN.4/1998/99 (1997). In fact, the *only* States not to have ratified the Convention are the United States and Somalia—a country lacking a central government. *See Rights of the Child: Status of the Convention on the Rights of the Child*, U.N. ESCOR, 57th Sess., Agenda Item 13, U.N. Doc. E/CN.4/2001/74, 5 & Annex 1 (2000). Indeed, the Convention on the Rights of the Child has been the catalyst that has prompted many countries in the past 10 years to change their laws to raise the age of eligibility for the death penalty to 18. The United Nations reported that Barbados, Yemen, and Zimbabwe changed their laws in 1994. *See Crime prevention and criminal justice: Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Report of the Secretary General*, U.N. ESCOR, Economic and Social Council, Subst. Sess., U.N. Doc. E/2000/3 at 21 (2000). Likewise, China changed its age for death penalty eligibility to 18 in 1997. *Id.* Indeed, by the time of that report in 2000, only 14 countries that had ratified the Convention had not formally changed their laws to incorporate the prohibition on the juvenile death penalty. *Id.*[5] None of those countries had placed reservations on the Convention's prohibition on the juvenile death penalty, and only six have executed juvenile offenders since 1991:

[5] The countries were Afghanistan, Burundi, Bangladesh, the Democratic Republic of the Congo, India, Iran, Iraq, Malaysia, Morocco, Myanmar, Nigeria (excepting Federal Law), Pakistan, the Republic of Korea, Saudi Arabia, and the United Arab Emirates. *Id.* at footnote 36.

Democratic Republic of the Congo (1 in 2000), Iran (6: 3 in 1992, 1 in 1999, 1 in 2000, 1 in 2001), Nigeria (1 in 1997), Pakistan (2: 1 in 1992, 1 in 1997), Saudi Arabia (1 in 1992), and Yemen (1 in 1993). Amnesty International, *Too Young to Vote, Old Enough to be Executed*, AI Index: AMR 51/105/2001 (June 2001). In addition, Amnesty International documented an execution in Pakistan on November 3, 2001 (Amnesty International, *Death Penalty News, December 2001*, AI Index: ACT 53/001/2002 (January 2, 2002)) and one in Iran on January 25, 2004 (Amnesty International, *Iran: Amnesty International calls on Iran to halt executions of child offenders,* AI Index: MDE 13/005/2004 (January 28, 2004).[6]

In each of the six other countries where juveniles have been executed since 1990, either the laws have been changed or the governments have denied that the executions of juvenile offenders took place. For example, the laws have changed in Yemen, as noted above, and Pakistan promulgated the Juvenile Justice System Ordinance in July 2000, banning the death penalty for anyone under 18 at the time of the crime. *Amnesty International Report* 2001, Annual Summaries 2001, page 186, AI Index:POL 10/006/2001. Since the passage of the Juvenile Justice System Ordinance, President Musharraf of Pakistan commuted the death sentences of approximately 100 young offenders to imprisonment in response to Amnesty International's Secretary General Irene Khan's request. Amnesty International Irish Section, *Pakistan: Young Offenders Taken Off Death Row*, AI Index: ASA 33/029/2001 (Dec. 13, 2001).

[6] Amnesty International also reported that a juvenile offender was executed in China in 2003, because the courts do not take sufficient care to determine the age of offenders. Amnesty International, *Execution of Child Offenders: Updated Summary of Cases*, Press Release, February 16, 2004, *available at* http://news.amnesty.org/mavp/news.nsf/print/ENGPOL300062004.

Nigeria, as noted in the United Nations report above, has national legislation setting the age at 18. *Crime Prevention and Criminal Justice*, *supra*. With respect to the execution in 1997, the Nigerian government insisted to the Sub-Commission on the Promotion and Protection of Human Rights last year that the offender was well over 18 at the time of the offense and reiterated that any juveniles convicted of capital offenses have their sentences commuted. *See Summary Record of the 6th Meeting of the Sub-Commission on the Promotion and Protection of Human Rights*, 52d Sess., August 4, 2000, U.N. Doc. E/CN.4/Sub.2/ 2000/SR.6 ¶ 39 (2000). Saudi Arabia has adamantly insisted at the Commission on Human Rights that the allegations regarding the execution of a juvenile in 1992 are untrue. *See Summary Record of the 53rd meeting of the Commission on Human Rights*, 56th Sess., April 17, 2000, U.N. Doc. E/CN.4/2000/SR.53, 88 and 92 (2000). While there has been documentation that the executions in Nigeria and Saudi Arabia did take place, *see*, Amnesty International, *Children and the Death Penalty: Executions Worldwide Since 1990*, ACT 50/010/2000, the denials by the governments are an indication that those countries have accepted the norm.

While executions of juvenile offenders seem to have taken place with more frequency in Iran, that government also has denied at the Commission on Human Rights that such executions take place. *See* United Nations Press Release, *Commission on Human Rights Starts Debate on Specific Groups and Individuals*, April 11, 2001 (Right of Reply by Representative of Iran). Furthermore, in December 2003, a bill establishing special courts for minors and removing provisions for the execution of child offenders was passed by the Iranian parliament and awaits ratification of the Guardian Council, the highest legislative body in Iran. *See* Amnesty International, *Iran: Amnesty International calls on Iran to halt executions of child offenders*, AI Index: MDE 13/005/2004 January 28, 2004.

Finally, the Democratic Republic of the Congo, which is in the midst of civil war, is also reported to have executed a juvenile offender in 2000, despite a moratorium on the death penalty in that country. *See* Amnesty International, *Dem. Republic of Congo: Killing Human Decency*, AI Index: AFR 62/11/00, at 12, May 31, 2000. However, that execution was carried out by the Military Order Court rather than through the judicial process. *Id.* In 2001, when four juvenile offenders were sentenced to death by the Military Order Court, the executions were stayed and the sentences commuted following appeals from the international community. *See Death Sentences of Five Children Commuted to Life Imprisonment*, OMCT-World Organization Against Torture, Case COD 270401.1.CC, 31 May 2001. Thus, it appears that even during wartime, the Democratic Republic of the Congo intends to comply with the international norm banning the juvenile death penalty.

Hence, the United States stands alone in not accepting the norm against the execution of juvenile offenders. Even if the reports that executions of juveniles took place not only in the United States but in Iran as well, the level of adherence to the norm is similar to those noted in the Restatement (Third) as having had attained peremptory status: rules prohibiting genocide, slave trade and slavery, apartheid and other gross violations of human rights. Restatement (Third) of the Foreign Relations Law, § 102 rptr. n.6, *supra*. And while United States courts have found the prohibition against torture to have attained the status of a *jus cogens* norm, *see, e.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992); *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), Amnesty International found that 125 countries violated that norm in 2001. *Amnesty International Report* 2001, Annual Summaries 2001, AI Index:POL 10/006/2001. In stark contrast, only ~~two or~~ perhaps three

countries have violated the norm prohibiting the execution of juvenile offenders in the past year.

3. The Norm Is Non-Derogable

The prohibition against the juvenile death penalty is non-derogable. Among the indications of this fact is that the International Covenant expressly provides that there shall be no derogation from Article 6, which prohibits the imposition of the death penalty on juvenile offenders. *See* International Covenant, *supra*, art. 4. The express prohibition in the treaty coupled with the wide acceptance as evidenced by the resolutions and rulings of international bodies, and the laws and practice of other nations, support the conclusion that the norm is non-derogable.

4. There Is No Emerging Norm Modifying This Norm

As to the fourth and final requirement, there is no emerging norm that contradicts the current norm. The prohibition of the juvenile death penalty enjoys near universal acceptance. There is thus no question that the prohibition against the execution of persons who were under 18 at the time they committed their crime has attained the status of a *jus cogens* norm.

B. *Jus Cogens* Norms Are Binding in the United States

As this Court has noted, customary international law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction." *The Paquete Habana*, 175 U.S. 677, 700 (1900). *See also* Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 Yale L. J. 2277, 2284 (1991); Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1561 (1984); Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824 (1998); Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 Harv. Hum. Rts J.

53, 69-70 (1990); Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 Mich. J. Int'l L. 301 (1999). In this regard, the Restatement (Third) provides that "[i]nternational law and international agreements of the United States are the law of the United States and supreme over the law of the several States" and "[c]ourts in the United States are bound to give effect to international law and to international agreements of the United States." Restatement (Third) of Foreign Relations Law, § 102. "[A]s in the case of treaties, American courts will give effect to the obligations of the United States under customary law; at the behest of affected private parties, courts will prevent violations of international law by the States." Louis Henkin, *Foreign Affairs and the Constitution* 223 (1972); *see also* Blackmun, *supra,* at 45-46.

The principle that customary international law is part of United States law applies with even greater force when considering a peremptory norm. *See, e.g., United States v. Mata-Ballesteros*, 71 F.3d 754 (9th Cir. 1995); *In re Estate of Ferdinand E. Marcos Human Rights Litigation ["Marcos II"]*, 25 F.3d 1467 (9th Cir. 1994); *In re Estate of Ferdinand E. Marcos Human Rights Litigation ["Marcos I"]*, 978 F.2d 493 (9th Cir. 1992); *White v. Paulson*, 997 F. Supp. 1380 (E.D. Wash. 1998). As the United States Court of Appeals for the Ninth Circuit noted in *Siderman de Blake v. Argentina*, courts of this country are obligated to enforce *jus cogens* norms. *Siderman de Blake*, 965 F.2d at 715-16. The Ninth Circuit observed that "[b]ecause *jus cogens* norms do not depend solely on the consent of states for their binding force, they 'enjoy the highest status within the international law.' [Citation omitted.] For example, a treaty that contravenes *jus cogens* is considered . . . to be void." *Id.* at 715 (citing to the Vienna Convention).

This Court should likewise recognize that the *jus cogens* norm against the juvenile death penalty is binding on this country and at the very least is relevant to determining the

parameters of the evolving standards under the Eighth Amendment.[7]

C. The *Jus Cogens* Norm is Enforceable Through the Eighth Amendment

As mentioned above, this Court has repeatedly recognized the relevance of international law and opinion when considering the evolving standards of decency under the Eighth Amendment. *See, e.g., Enmund*, 458 U.S. at 796 n.22 (death penalty may not be imposed for felony murder, citing the experience of Commonwealth and Western European countries); *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (international opinion was relevant in finding that the death penalty for rape violated the Eighth Amendment); *Trop*, 356 U.S. at 102, 126 (foreign state practices were deemed relevant to the determination that denaturalization of a military deserter constituted cruel and unusual punishment). The Court should recognize in this case as well that the uniform rejection by the rest of the world of the practice of executing juveniles is weighty evidence that this practice is inconsistent with evolving standards of decency. At a minimum, the international consensus is relevant to determining that the very rare usage of the juvenile death penalty, even in the United States itself, "is not merely an historical accident" but instead the practice runs afoul of the Eighth Amendment's prohibition on "cruel and unusual punishment."

Moreover, international human rights standards have often been useful tools for interpreting laws in the United States.

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[7] While the Court in the *Paquete Habana* noted that customary international law is looked to "where there is no treaty, and no controlling executive or legislative act or judicial decision," 175 U.S. 677, 700 (1900), that does not preclude courts from considering customary international law or *jus cogens* norms to determine whether evolving standards of decency under the Eighth Amendment do include, in the words of the First Chief Justice, "the law of nations."

See, e.g., Lareau v. Manson, 507 F. Supp. 1177, 1189 (D. Conn. 1980); *see generally*, Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 1 Rutgers Race & L. Rev. 193 (1999); Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. Cin. L. Rev. 3 (1993). Indeed, the United States government told the Human Rights Committee that "the courts could refer to the Covenant and take guidance from it." Statement of Conrad Harper, Legal Advisor, U.S. Department of State, U.N. GAOR, Hum. Rts. Comm., 53rd Sess., 1405th mtg., U.N. Doc. HR/CT/404 (1995). The strong consensus against the execution of juvenile offenders that runs throughout international law—and that in particular is embodied in the International Covenant, a treaty to which the United States is a party—is strong evidence that the execution of juvenile offenders is in fact cruel and unusual punishment.

CONCLUSION

There is no clearer precept in international law than the prohibition of the death penalty for juvenile offenders. The United States cannot continue to demand compliance with human rights principles and norms abroad while it refuses to apply them in its own country. As the final arbiter of the meaning of the Eighth Amendment, this Court has the obligation to consider whether indeed the principles embraced by the rest of the world must be applied here as well. Most if not all other countries of the world now prohibit the execution of offenders who were under 18 at the time of the commission of their crime. In this case, the Supreme Court of the State of Missouri has determined that indeed the standards under the Eighth Amendment have evolved to comply with what is now a peremptory norm of international law. Its judgment should be upheld.

Respectfully submitted,

Constance de la Vega
Counsel of Record
Audrey J. Anderson
Michael Bochenek
William H. Johnson
Thomas H. Speedy Rice
Philip Sapsford, Q.C.
Hugh Southey

Counsel for Amici Curiae
*Human Rights Committee of the Bar of England and Wales, Human Rights Advocates, Human Rights Watch, and the World Organization for Human Rights USA**

* Research assistance was provided by students Sarah Canepa, University of San Francisco School of Law; Brenda Dosio, Christine Njeru, University of Central England; Linda Wood, Wolverhampton University.

APPENDIX

Human Rights Advocates, a California non-profit corporation, founded in 1978, with national and international membership, endeavors to advance the cause of human rights to ensure that the most basic protections are afforded to everyone. Human Rights Advocates has a Special Consultative Status in the United Nations and has participated at the meetings of the Commission on Human Rights. Human Rights Advocates has submitted briefs as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal statutes at issue. Examples of *amicus* briefs that Human Rights Advocates has filed include those in the following cases: *Gutter v. Bollinger*, 539 U.S. 306 (2003); *Domingues v. Nevada*, No. 98-8327, *cert. denied*, 528 U.S. 963 (1999); *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir.), *cert. denied*, 522 U.S. 963 (1997); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996).

Human Rights Watch is a non-governmental organization established in 1978 to monitor and promote observance of internationally recognized human rights. It also has a Special Consultative Status in the United Nations. It regularly reports on human rights conditions in more than 70 countries around the world, and it actively promotes legislation and policies worldwide that advance protections in the area of domestic and international human rights and humanitarian law.

The Bar of England and Wales, through the Human Rights Committee, appears on behalf of persons whose human rights are endangered. The Human Rights Committee is nonpolitical and nonpartisan. Its guiding principle is the belief that no person should be punished for any crime except after a trial and appeals process that accords with the highest standards for fairness and the rule of law. The Bar Council seeks to set

out international standards in the hope that international, English, British Commonwealth and European Court of Human Rights sources may be of assistance to this Court. Those international standards are especially relevant because the United States has ratified the International Covenant on Civil and Political Rights, thus evincing a sincere concern for the norms of international law.* Further, the comity among the common-law nations makes the experience of each persuasive to the other. In particular, the courts of the United States and of England have often looked to each other for guidance. For example, the United States Supreme Court in *Enmund v. Florida*, 458 U.S. 782, 816 n.29 (1982), specifically recognized the influence of international opinion and relied upon it to guide its determination. The Court noted that the felony murder doctrine had been abolished in England.

The World Organization for Human Rights USA (WOHR) (formerly the World Organization Against Torture USA) is an international human rights organization focusing on the issue of torture (defined under the Convention Against Torture as "severe pain or suffering") and the United States' compliance with international human rights standards. In light of this experience, and its close association with an international human rights network focused on these issues, WOHR can assist the Court in its consideration of this case. WOHR believes that its input, reflective of its international

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* In submitting his proposal for the ratification of the International Covenant to the Senate for its advice and consent, President George H.W. Bush argued that ratification reflected the role that he envisaged for the United States as a leader amongst nations. In a letter submitted to Senator Clairborne Pell, Chair of the Senate Foreign Relations Committee, President Bush stated that "United States ratification of the Covenant on Civil and Political Rights at this moment of history would underscore our natural commitment to fostering democratic values through international law. 31 I.L.M. 645, 660 (May 1992).

contacts and experiences and its status as a well-recognized international human rights organization that plays a major role in litigation involving international human rights issues in this country's courts, will be useful to the Court in considering this case, and will provide an important international perspective.